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No. 82-1155

In the Supreme Court of the United States
OCTOBER TERM, 1982

OTASCO, INC., PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT*

MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION

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Petitioner contends that the requirement adopted by the Judicial Conference of the United States, pursuant to 28 U.S.C. (Supp. V) 1930(b), that creditors who initiate adversary bankruptcy proceedings pay a \$60 filing fee violates the Due Process Clause of the Fifth Amendment.

1. Petitioner is a financially solvent corporation that operates a chain of retail stores in Oklahoma. Petitioner sold automobile tires and certain other goods to Ronald Gene South and Terry Lyn Klingman ("the debtors") on credit, with petitioner retaining a security interest in the goods. See Pet. App. 2a; Pet. 4 & n.2. The debtors subsequently defaulted, and petitioner instituted proceedings in state court for personal judgments against the debtors and repossession of the goods (Pet. App. 2a). While these proceedings were pending, the debtors filed voluntary bankruptcy petitions in the United States Bankruptcy Court for

the Western District of Oklahoma, naming petitioner as a creditor (*ibid.*). Pursuant to Section 362 of the Bankruptcy Code, 11 U.S.C. (Supp. V) 362, petitioner's state court proceedings consequently were stayed automatically, along with any other action that would affect or interfere with the property of the debtor or of the bankrupt estate (Pet. App. 2a). Petitioner then instituted adversary proceedings against the debtors by filing complaints in the bankruptcy court seeking relief from the automatic stay and objecting to discharge of the debts (*ibid.*). See Bankr. R. 703.

To file each of these complaints, petitioner was required to pay a \$60 filing fee prescribed by the Judicial Conference of the United States pursuant to 28 U.S.C. (Supp. V) 1930(b). Petitioner filed a motion asserting that payment of the fees was unconstitutional, and the fees were placed with the court clerk "in escrow" pending the resolution of the challenge to the fee (Pet. 13 n.21).

2. After allowing the United States to intervene to defend the legality of the filing fee, the bankruptcy court held that the filing fee requirement violates the Due Process Clause of the Fifth Amendment (Pet. App. 1d-17d).¹ Relying primarily on *Boddie v. Connecticut*, 401 U.S. 371 (1971), the bankruptcy court held that the fee is unconstitutional because it interferes with a creditor's access to an exclusive forum (Pet. App. 14d-16d) and burdens a creditor's "*fundamental right to defend a recognized interest*" in property (*id.* at 15d; emphasis in original). The district court affirmed (Pet. App. 1c-7c), holding that "[n]o fee is properly chargeable as a condition precedent to a person's right to

¹The court also held that the Judicial Conference exceeded its statutory authority in prescribing the \$60 fee (Pet. App. 15d). On appeal, however, petitioner conceded the existence of statutory authority for the fee, and that authority is not in issue here. See Pet. App. 2a n.1.

defend life, liberty or property in a forum having sole, exclusive jurisdiction" (*id.* at 6c; emphasis in original).

The court of appeals reversed (Pet. App. 1a-9a). The court held that, whether or not petitioner is characterized as a defendant, due process does not require that its access to bankruptcy proceedings be free from the burden of a fee requirement (*id.* at 4a). Rather, the court explained (*id.* at 5a): "The constitutionality of the filing fee * * * turns on whether the fee 'unduly' burdens [petitioner's] access to the judicial process, which in turn is determined by balancing the interest [petitioner] seeks to assert in court against the government's interest in exacting the fee." The court stated that petitioner's "contractual rights of immediate possession, immediate payment in full, and personal recourse against the debtor * * * [do not] touch on fundamental interests" (*id.* at 5a-6a) and had to be balanced against the legitimate government interests underlying the fee. The court concluded (*id.* at 6a): "In the face of [petitioner's] ability to pay the fee, the nonfundamental nature of [petitioner's] interest, and the government's legitimate interest in levying the fee, we cannot say that the fee requirement unduly burdens [petitioner's] access to the judicial process."

3. Petitioner's contention (Pet. 13-19) that the filing fee requirement violates the Fifth Amendment was correctly rejected by the court of appeals and does not warrant review by this Court. Petitioner asserts (Pet. 14-15) that "[c]onditioning the right to defend one's property rights upon the payment of a fee is constitutionally impermissible * * *." First, the underlying premise of this contention is false. Petitioner is not a defendant. It is a creditor whose interest is affected by petitions for bankruptcy filed by two debtors. As the court of appeals stated (Pet. App. 4a), petitioner was not required to institute an adversary proceeding, thus incurring the \$60 filing fee, in order to protect its security interest. Alternatively, it could have filed a "proof of claim"

without paying a fee. See 11 U.S.C. (Supp. V) 501-502. This would have entitled petitioner to an adjudication of its rights, although it would not have provided for lifting the stay. It may be that the institution of an adversary proceeding provided important practical advantages to petitioner as opposed to the proof of claim procedure, but it is nevertheless true that petitioner cannot properly be characterized as a "defendant" who *must* pay a fee to protect its interest. If anything, petitioner's institution of an adversary proceeding is best analogized to the filing of a complaint by a *plaintiff* in district court. Petitioner is in no different position from any person who, finding that his interest may be adversely affected by a legal action, determines that the most effective strategy is to take the offensive and institute a proceeding, which almost invariably would require the payment of a filing fee.

In any event, even if petitioner's situation is more analogous to that of a defendant than a plaintiff, the court of appeals correctly held that due process does not prohibit the imposition of a fee for filing an adversary proceeding complaint. Petitioner relies (Pet. 15) on *Burns v. Ohio*, 360 U.S. 252 (1959), and *Smith v. Bennett*, 365 U.S. 708 (1961), for the proposition that "[t]he government may not impose a fee or tax as a prerequisite to the right to defend." But these two cases involved the imposition of fees on *indigent* persons in situations where the fees precluded them from filing an appeal in a criminal case or a writ of habeas corpus. Obviously, the due process concerns involved in those cases have no application to the situation of petitioner, which is a solvent corporation (see Pet. App. 6a) simply faced with the question whether the filing of an adversary proceeding is worth the cost of litigation — including a \$60 filing fee.²

²Indeed, in *Griffin v. Illinois*, 351 U.S. 12 (1956), where the Court held that an indigent has the right to be provided a transcript in order to appeal his conviction, the Court never suggested that it would be unconstitutional to impose the transcript fee on non-indigent defendants.

Petitioner's reliance (Pet. 15-18) on *Boddie v. Connecticut, supra*, is also misplaced. In *Boddie*, the Court invalidated a state court filing fee required of indigent persons seeking a divorce. Because this case does not involve indigents, there is no question here of the filing fee precluding access to the courts, which was a critical factor in *Boddie*. See 401 U.S. at 382. Moreover, petitioner's contractual rights have far less constitutional significance than the fundamental interest of the *Boddie* appellants in obtaining a divorce. Even in cases involving indigents, the Court has upheld filing fee requirements where the interests involved did not rise to the level of the interest involved in *Boddie*. In *United States v. Kras*, 409 U.S. 434 (1973), the Court upheld the imposition of a fee upon indigents as a condition on receipt of a discharge in bankruptcy, specifically distinguishing *Boddie* on the basis of the nature of the interest involved. See 409 U.S. at 446. And in *Ortwein v. Schwab*, 410 U.S. 656 (1973), the Court upheld a filing fee for obtaining appellate court review of an agency determination reducing welfare benefits. See also *Ross v. Brown Title Corp.*, 356 F. Supp. 595 (E.D. La.), aff'd, 412 U.S. 934 (1973) (upholding state requirement that defendants in a foreclosure action post security prior to resisting foreclosure).

Thus, the court of appeals correctly held (Pet. App. 5a) that *Boddie* "did not hold that a defendant's access to court can never be burdened." Rather, the Court in *Boddie* utilized a balancing test and found a due process violation because of "the absence of a sufficient countervailing justification" for the State's rule that effectively denied access to divorce court to indigents. See 401 U.S. at 380-381; Pet. App. 5a. Here, the court of appeals plainly was correct in holding that, weighing the government interests involved in establishing filing fees against the burden on a solvent corporation of paying a small fee to initiate an adversary proceeding, the fee does not violate due process.

**It is therefore respectfully submitted that the petition for
a writ of certiorari should be denied.**

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